

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8	DENNIS TOMOSON,)	No. 05-CV-112-MWL
9	Plaintiff,)	
10	v.)	ORDER DENYING PLAINTIFF'S
11	RICHARD MORGAN, ELDON VAIL,)	MOTION FOR RECONSIDERATION
12	ANNE ADAMS, MARGE LITTRELL, and)	
13	ROBERT PIVER,)	
	Defendants.)	

Before the court is Plaintiff's Motion for Reconsideration. (Ct. Rec. 24). The court having reviewed the files and records in the matter, **DENIES** Plaintiff's motion.

I. BACKGROUND

Plaintiff is a Washington State inmate who filed a 42 U.S.C. 1983 civil rights action against prison officials and employees, alleging violations of his constitutional rights. (Ct. Rec. 1, 7). Plaintiff alleges retaliation by prison officials after he complained about a staff member. He alleges he was infracted and subjected to a disciplinary hearing in violation of due process and equal protection rights. Defendants filed a motion to dismiss the equal protection and due process claims for failure to state cognizable constitutional claims. (Ct. Rec. 11). The court granted defendants' motion to dismiss those claim, leaving only plaintiff's

1 retaliation claim. (Ct Rec. 18).

2 Plaintiff then moved the court to reconsider its order based on
3 Burnsworth v. Gunderson, 179 F.3d 771 (1999). After considering
4 plaintiff's motion, the court requested additional briefing in
5 response to plaintiff's argument. Defendant responded to
6 plaintiff's argument as ordered by the court. (Ct. Rec. 40).
7 Plaintiff did not file a reply.

8 **II. ISSUES**

9 The issue presented by plaintiff's motion is whether, even
10 without a cognizable liberty interest, due process was implicated at
11 plaintiff's disciplinary hearing. Plaintiff asserts defendants
12 failed to produce any evidence at plaintiff's disciplinary hearing,
13 which resulted in a penalty of 15 days segregation.

14 **III. DISCUSSION**

15 A. Due Process Claim

16 Plaintiff relies upon Burnsworth in asserting that his due
17 process rights have been violated. In Burnsworth, prison officials
18 disciplined a prisoner because he said he would have tried to escape
19 if he had not been afforded protection from fellow inmates who were
20 threatening him. Prison officials presented no evidence of escape
21 or attempt to escape at the prisoner's disciplinary hearing.
22 Nonetheless, the disciplinary board found him guilty of an
23 infraction and his good time credit was revoked. The court held
24 that the prison disciplinary board's actions after a hearing where
25 "not a shred of evidence was produced" violated due process, even
26 though a "cognizable liberty interest" was not demonstrated.
27 Burnsworth, 179 F.3d at 774.

28 Defendants distinguish Burnsworth by arguing that, here, no

1 good time credits were lost by plaintiff, so the Burnsworth holding
2 does not apply. Rather, plaintiff received 15 days segregation,
3 which the Supreme Court has held does not rise to the level of
4 "atypical and significant deprivation" that would give rise to due
5 process protections. Sandin v. Conner, 515 U.S. 472, 484, 115 S.Ct.
6 2293 (1995). Defendants also argue that Burnsworth has been
7 overruled by Wilkinson v. Austin, a recent Supreme Court case in
8 which the Court held that to invoke the Fourteenth Amendment's
9 procedural protection, a plaintiff must establish the deprivation of
10 a life, liberty or property interest. Wilkinson v. Austin, 125 S.
11 Ct. 2384, 2393 (2005).

12 The court does not need to reach the issue of whether
13 Burnsworth has been overruled because, contrary to plaintiff's
14 allegations, evidence was produced at the disciplinary hearing prior
15 to plaintiff's segregation; thus, Burnsworth is not applicable.
16 Plaintiff's complaint refers to evidence produced at his
17 disciplinary hearing and considered by the disciplinary board. That
18 evidence is attached to his complaint: the infraction report [ISIR]
19 describing his alleged violations, and two memos from prison
20 officials in support of discipline. (Ct. Rec. 7). Simply because
21 plaintiff disputes the credibility of the evidence does not mean the
22 evidence does not exist. Rather, the disciplinary board considered
23 the evidence presented and determined 15 days of segregation was
24 warranted. Plaintiff's argument that he has due process rights,
25 without establishing a constitutional liberty interest, fails.
26 Wilkinson, 115 S.Ct. at 2393. Dismissal of the due process claim is
27 affirmed.

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2 B. Equal Protection Claim

3 Plaintiff argues the alleged lack of due process at his
4 disciplinary hearing constitutes an equal protection violation. (Ct
5 Rec. 14, p. 7). As discussed above, the facts alleged by plaintiff
6 do not establish a due process claim. Further, to establish an
7 equal protection claim under 42 U.S.C. § 1983, plaintiff must allege
8 that he was intentionally discriminated against as a member of a
9 protected class. Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir.
10 1998). He has failed to do so; therefore, dismissal of this claim
11 is affirmed.

12 Accordingly,

13 **IT IS ORDERED** that Plaintiff's Motion for Reconsideration (Ct.
14 **Rec. 24**) is **DENIED**.

15 The District Court Executive shall file this Order and provide
16 a copy to counsel for Plaintiff and counsel for Defendants.

17
18 DATED this 12th day of October 2005.

19 S/ Michael W. Leavitt
20 MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE